



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Power Dynatec Corp.

File: B-236896

Date: December 6, 1989

DIGEST

Where agency determines after award that awardee's descriptive literature submitted with its best and final offer (BAFO) was nonconforming, agency is not required to eliminate awardee from competition but may afford awardee an opportunity to correct its proposal by reopening negotiations with all offerors within the competitive range, advising awardee during discussions that its descriptive literature is nonconforming, and then allowing all offerors an opportunity to submit a second round of BAFOs.

DECISION

Power Dynatec Corp. (PDC) protests the award of a contract to McCormick-Morgan Power Systems Engineers (MMPSE), under request for proposals (RFP) No. N00604-88-R-0086, issued by the Naval Supply Center for a motor generator set.

We deny the protest in part and dismiss it in part.

The RFP was issued on August 15, 1988. By the deadline for receipt of initial proposals on February 24, 1989, the Navy received six proposals, four of which were determined to be within the competitive range. Best and final offers (BAFOs) were submitted by these four offerors and award was made to MMPSE on August 10. On September 11 PDC protested the award to our Office on the basis that the descriptive literature the awardee submitted with its offer did not comply with the RFP requirements, and that by waiving the descriptive literature requirements for the awardee, the Navy improperly changed the specifications without notice to all offerors. After reviewing PDC's protest, the Navy agreed that MMPSE's descriptive literature was inadequate to establish compliance with the specifications, but determined that it had failed to conduct meaningful discussions by not

bringing the deficiencies to MMPSE's attention. Accordingly, the Navy suspended performance by MMPSE, revealed all offerors' BAFO prices, reopened negotiations, and requested another round of BAFOs from the offerors originally in the competitive range. Based on these second BAFOs, the Navy again made award to MMPSE as the low, technically acceptable offeror.

PDC contends that after the Navy determined that MMPSE's descriptive literature was deficient, it should have made award to PDC on the basis of the firm's next low price under the previous round of BAFOs, rather than reopen negotiations with all offerors in the original competitive range. PDC maintains it was improper to reopen negotiations here since the solicitation no longer was in effect, having been superseded by MMPSE's contract. PDC thus requests that MMPSE's contract be terminated and that award be made to PDC or, in the alternative, that the requirement be resolicited. PDC also requests bid preparation costs and attorneys' fees.^{1/}

We find that the corrective action taken by the Navy here was appropriate under the circumstances. Although PDC argued in its protest that MMPSE should have been eliminated from the competition based on its nonconforming literature, as this was a negotiated procurement and the Navy considered MMPSE's offer to be generally acceptable, the agency was not required to eliminate the firm's offer from consideration outright. Rather, the proper course would have been to advise MMPSE during discussions that its descriptive literature did not establish that the offered item conformed to the specifications, as required by the RFP, and then to request BAFOs from all offerors. The Navy requested BAFOs, but improperly awarded MMPSE the contract without first seeking correction of this defect in MMPSE's offer.

Given these facts, we find nothing objectionable in the agency's decision to reopen the competition, afford MMPSE an opportunity to correct its proposal defect, and then allow all offerors an opportunity to submit second BAFOs; indeed, this would be the only means available to place all

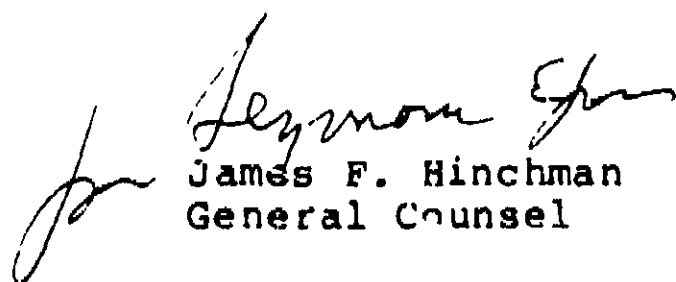
^{1/} The Navy asks that we dismiss the protest as academic on the basis that it has taken corrective action. The protest is not academic; we will consider whether the action taken by the Navy was appropriate to remedy the original improper award. Corrective action taken by an agency to resolve a procurement deficiency would not be deemed appropriate if it did not return the protester essentially to its competitive position prior to the deficiency.

offerors, including MMPSE and PDC, in the same competitive posture they enjoyed prior to the defective award. PDC's suggestion that the awarding of a contract rendered the original solicitation void, and that a reopening of the original competition therefore was impossible, is without merit; we are aware of no legal impediment to reviving a competition under a solicitation in order to correct an improperly made award under that solicitation. This view is reflected in numerous decisions of our Office, in which we have recommended that competition be reopened and new BAFOs solicited to correct similar deficiencies. See, e.g., Keystone Eng'g Co., B-228026, Nov. 5, 1987, 87-2 CPD ¶ 449; Greenleaf Distrib. Servs., B-221335, Apr. 30, 1986, 86-1 CPD ¶ 422.

PDC contends that the Navy's request for a second round of BAFOs created an improper auction because cost and technical information was revealed among the parties. In our view, however, risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action, which in this case means remedying the agency's failure to allow MMPSE to correct the deficiencies in its offer during discussions, prior to award, by reopening discussions and requesting new BAFOs. See generally Roy F. Weston, Inc.--Request for Recon., B-221863.3, Sept. 29, 1986, 86-2 CPD ¶ 364.

Finally, PDC argues that MMPSE's second BAFO only stated that its offered item is in compliance with the specifications, with no evidence that this is the case, and that the BAFO thus still should not be deemed acceptable. We disagree. MMPSE's assurances of compliance were in response to specific questions presented it by the Navy during the reopened discussions. As the Navy was otherwise satisfied that MMPSE's offered test set met the RFP requirements, and since nothing in the proposal was found to take exception to the requirements, the Navy considered this response sufficient. PDC has presented no evidence that MMPSE's test set does not satisfy solicitation requirements, and we find no basis for questioning the Navy's determination in this regard.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel